

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,421

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

SEP 10 1955

JOHN McSHAIN, INC.

Joseph W. Stewart

Appellant

CLERK

v.

UNITED STATES OF AMERICA,

Appellee

**APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.**

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APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

I. Whether, on a Motion for Judgment on Complaint and Amended Answer, an Order of the District Court striking some of the defenses in the Amended Answer as insufficient in law and setting down others for separate trial is a final decision or order from which an appeal lies to this Court. (The Court is respectfully referred immediately to Point I of the Summary of Argument and the Argument.)

II. If so, whether a binding contract exists when the Government represents to prospective proposers (bidders) that written "Requests for Proposals" will be mailed out and that the written "Contractor's Proposal" to be submitted in compliance with such Requests will not be final as to the conditions and price stated therein but will be received for the purpose of negotiating a construction contract; and then after mailing the Request and receiving the Proposal "accepts" the Proposal at the price stated therein without negotiating as to final conditions and price.

(a) Whether the documents attached to the Complaint established the above facts without ambiguity. The documents are as follows:

(1) The written "Requests for Proposals" which repeated the appellee's representations that the "Contractor's Proposal" submitted in compliance with the Requests would be received for the purpose of negotiating a construction contract, but which also stated that the Government reserved the right as its interest might require to reject any and all proposals and to negotiate with any proposer.

(2) Appellant's written "Contractor's Proposal" which stated it was being submitted "in compliance with your Request for Proposals" but also stated appellant would do the work for

(ii)

the price stated therein and stated that the Government reserved the right as its interest might require to accept any proposal; and

(3) Appellee's written Notice of Award mailed to appellant which stated that appellant's Proposal was accepted at the price stated therein.

(b) If the answer to (a) is in the negative, whether an ambiguity exists in the documents creating an exception to the parol evidence rule so as to permit appellant to prove the facts stated in Par. II above by evidence extrinsic of the documents.

III. Whether it is a good and provable equitable defense that appellee, knowing that appellant's proposal was based on the expectation that an existing contract with appellee then being performed in the same area would be continued in force, withheld from appellant information as to its intention to cancel the existing contract and accepted appellant's proposal submitted in ignorance of appellee's intention.

IV. Whether, as a matter of law, the decision of the Comptroller General of the United States on reference of the question to him by appellee that no contract was made between the parties, could not be a binding award.

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 13,421

JOHN McSHAIN, INC.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

**APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The complaint of appellee (J. A. 1) was for a money judgment in the amount of \$396,202.00 for breach of contract. The District Court had jurisdiction by virtue of 28 U.S. C. 1331 and 11-306 District of Columbia Code, 1951 Edition.

The amended answer of appellant (J. A. 19) set up seven defenses. On motion of appellee for judgment on the pleadings (J. A. 29) the Court by its order (J. A. 30) struck four of the defenses, set down for separate trial the appellant's defense of mistake which the Court treated as an affirmative defense, and set down for separate trial, if necessary, the issue of damages. No entry of judgment and certification for appeal under Rule 54 (b) F.R.C.P. was made or applied for. This Court has jurisdiction by virtue of 28 U.S. C. 1291 (Act of June 25, 1948, 62 Stat. 929.) (But see Point I in the Summary of Argument and in the Argument.)

STATEMENT OF THE CASE

This appeal is taken from an order or judgment rendered by the District Court (J. A. 30) striking as insufficient in law most, but not all, of the defenses pleaded by the appellant, John McShain, Inc., in its Amended Answer (J. A. 19) to appellee's complaint for damages for breach of contract in the amount asked for was \$396,202.00.

The controversy between the parties may be described as follows:

The Office of the District Engineer of the United States Army in Washington, D. C., solicited Proposals (bids) from selected contractors for certain construction work near Camp Ritchie, Maryland, which was classified as restricted. John McShain, Inc., the appellant herein, submitted a very low proposal, which it contends was not a firm bid but was submitted only for the purpose of negotiating a contract. Thereafter a conference was had between employees of appellant and the District Engineer which appellant contends was inconclusive. Immediately after the conference and on the same day, appellee issued and mailed to appellant its "Notice of Award and Notice to Proceed" at the price and under the terms stated in the Proposal. Appellant refused to sign an acknowledgment of the "Notice" and refused to sign the contract and performance bond sent with it. Thereafter at appellant's request conferences were held, but the differences were not resolved. Meantime, an existing nine million dollar contract which appellant was performing in the same area was cancelled (except a small portion) by telegram. Appellant refused to proceed with the work under the "Notice of Award and Notice to Proceed." Appellee had the work done by another contractor and brought suit against appellant for the damages claimed.

The initial question on this appeal is whether the order striking most of the defenses is a final judgment from which an appeal lies at this time. If so, the other questions are whether the Court ruled properly in striking the defenses as insufficient in law. One of these defenses, briefly stated, was that the Government by written "Requests for Proposals"

invited proposals from contractors to do certain construction work at Camp Ritchie, Maryland, for the stated purpose of negotiating a contract, and then after receiving the Proposal of the appellant -- which was one-third lower than the next lowest proposal -- treated the Proposal of appellant as a firm offer and "accepted" it without negotiating as to final conditions and price as promised.

Stated more fully, the allegations of the pleadings are as follows:

The complaint (J. A. 1) alleged that the appellee, United States, issued to the appellant among others a "Request for Proposals" dated September 14, 1951, copy of which was annexed to the complaint as Exhibit 1.

This Proposal, Exhibit 1 (J. A. 2) issued by the District Engineer for the Washington District of the Corps of Engineers of the United States Army, recited: "Proposals in duplicate will be received until 3:00 P.M., Eastern Standard Time, 2 October 1951, for the purpose of negotiating a construction contract for furnishing all plant, labor, materials and equipment, and performing all work for the above-described project in strict accordance with the specifications, schedules, addenda and drawings as follows: * * * * ". Thereafter reference was made by description to the specifications, drawings, and addenda to be issued. The "above-described project" mentioned in the first sentence of the Request for Proposals, was described as "Camp Ritchie Project - Primary Site, in the Vicinity of Camp Ritchie, Maryland." Paragraph 3 of the "Request for Proposals" read as follows: "The right is reserved, as the interest of the Government may require, to reject any and all proposals and to negotiate with any proposer."

The complaint (J. A. 1) further alleged that thereafter the appellant submitted to appellee a Contractor's Proposal dated October 2, 1951, a copy of which was annexed to the complaint as Exhibit B.

Exhibit B to the complaint was entitled "Contractor's Proposal" (J.A. 2) and was addressed to the District Engineer for the Washington District. The first sentence read as follows: "In compliance with your Request for Proposals dated 14 September 1951 the undersigned hereby proposes to furnish the plant, labor, materials, and equipment and perform all work for the above-described project in strict accordance with the specifications, schedules, drawings, and addenda." References were made to four addenda bearing dates September 20, 1951, September 20, 1951, September 25, 1951, and September 26, 1951.

On the last page, page P-6 of the Contractor's Proposal, immediately above the space for signature of the contractor, (J.A. 17) was the following statement:

"Condition: Bidders are advised that the award for this work will be made to one Bidder on Proposals Nos. 1 and 2. The right is reserved, as the interest of the Government may require, to accept or re- any or all items of any proposal."

The complaint further alleged (J.A. 1) that thereafter the appellee executed and sent to the appellant and the appellant received a Notice of Award and Notice to Proceed dated October 12, 1951, copy of which is annexed as Exhibit C to the complaint.

Exhibit C to the complaint, (J.A. 18) entitled "Notice of Award and Notice to Proceed" was dated 12 October 1951, addressed to John McShain, Inc., and read in part as follows: "You are hereby notified that your proposal dated 2 October 1951 in the total amount of \$6,574,825.00 for Proposals Nos. 1 and 2 and (sic) is accepted for construction and completion of the Camp Ritchie Project - Primary Site, Camp Ritchie, Maryland.**** This is your formal notice to proceed with the work under the contract. **** It is requested that you acknowledge receipt of this notice of award and notice to proceed on the three inclosed copies, retaining one copy and returning the original and one copy to this office at once." The letter was signed by Alan J. McCutchen, Colonel, Corps of Engineers, District Engineer. On the lower left-hand corner of the notice was the endorsement

for signature as follows: "Notice of Award and Notice to Proceed received, John McShain, Inc. by _____ Date _____." This was in typewriting. No signature appeared for the corporation.

The complaint further alleged (J. A. 1) that the defendant did not within the time limited therefor, or thereafter, proceed with the work described in the exhibits annexed.

The complaint further alleged (J. A. 1) that by reason of the defendant's failure to proceed "as provided by the contract thus made" plaintiff was damaged in the sum of \$396,202.00.

The amended answer of the appellant admitted (Second Defense, J. A. 19) the allegations of paragraphs 1, 2, 3, 4, and 5 of the complaint to the effect that appellee issued the Request for Proposals; appellant submitted its Contractor's Proposal; appellee executed and sent to appellant and appellant received the Notice of Award and Notice to Proceed; and that appellant did not, within the time limited therefor, nor thereafter, proceed with the work.

The order appealed from (J. A. 30-31) struck as insufficient in law appellant's First, Fourth, Sixth, and Seventh Defenses.

First Defense. The First Defense in the amended answer (J. A. 19) stated that the complaint failed to state a claim upon which relief could be granted.

Fourth Defense, Sub-section (a). Subsection (a) of the Fourth Defense (J. A. 19) may be summarized as follows: Before appellee issued to appellant its written Request for Proposals, appellee represented to all prospective proposers that the conditions and price which would be set forth in any Proposal submitted by a proposer would not be final, but that after the Proposals were opened negotiations would be conducted for the purpose of determining what the final conditions and price would be. The written Requests for Proposals sent to the prospective proposers contained a similar promise in the first sentence thereof stating that proposals

would be received "for the purpose of negotiating a construction contract" (J.A. 2). This procedure was identical with the procedure in a previous transaction in which appellant had submitted to appellee a Proposal and thereafter negotiations were had which resulted in a contract different in conditions and price from those set forth in the appellant's Proposal. The paragraph concluded with the statement that the appellant's Proposal was not an offer which was final as to conditions and price, but was means of initiating negotiations with the plaintiff for a contract.

Sub-section (b) of the Fourth Defense (J.A. 19-20) stated in effect that the appellee, knowing that the appellant had submitted its proposal relying upon the continuation of a construction project which appellant was already engaged in for the appellee under existing contract for work in the same area, issued its Notice of Award and Notice to Proceed without advising the appellant of its intention at that time to terminate the existing contract.

Sub-section (c) of the Fourth Defense (J.A. 20) stated that six proposals altogether were submitted to appellee; that bid bonds were not required and not furnished; and that the three lowest proposals were \$8,033,110.00; \$7,944,011.00; and \$6,574,825.00, the last named being the proposal of appellant. This proposal was \$2,170,157.50 less than the average of the six proposals submitted, and \$1,269,185.00 less than the next lowest proposal.

Sub-section (d) of the Fourth Defense (J.A. 20-21) alleged that the plaintiff did not conduct or intend to conduct negotiations as to final conditions and price as promised before the Request for Proposals were issued and as promised in the Request for Proposals itself, but that, after a brief conference with employees of the defendant who were without authority to negotiate for or to bind appellant, issued the contract papers which appellant did not sign.

Sub-section (d) of the Fourth Defense (J.A. 20) further set forth the fact of the cancellation of the first job, a jurisdictional dispute within the union which would seriously affect the wage rates, and mistakes and errors in the appellant's Proposal as items as to which negotiation was requested by appellant and refused by appellee.

Sixth Defense. The Sixth Defense (J.A. 21-2) recited that the appellant presented the facts in this matter to the Secretary of the Army who referred the matter to the Comptroller General requesting a decision, and that on February 12, 1952, the Comptroller General decided on the basis of the facts developed from the evidence presented, that no contract was ever consummated, and that the defendant had incurred no liability under its bid. The Comptroller General's decision is attached to the amended answer as an exhibit. (J.A. 22).

The Comptroller General's decision, exhibit A to the amended answer, (J.A. 22) is dated February 12, 1952, and is addressed in letter form to the Secretary of the Army. It begins: "Reference is made to your letter of January 11, 1952, with enclosures, requesting a decision as to whether an enforceable contract exists between the Government and John McShain, Inc. for certain construction work at Camp Ritchie, Maryland, covered by Invitation No. ENG-49-080-52-13 (15) dated September 14, 1951."

It appears from the decision that the facts supplied to the Comptroller General by the appellee in the reference of the question included the following:

- (1) That the Division Engineer in New York immediately after learning of the results of the bidding instructed the District Engineer in Washington to determine whether in view of appellant's relatively low bid an error had been made, but the District Engineer replied that appellant was pressing for an award, whereupon authority was granted to the District Engineer to make the award. (J.A. 23).

(2) The second and third lowest bidders refused to negotiate when they learned how low the appellant's proposal was. (J. A. 23).

(3) Appellee recognized that appellant was able to pare certain administrative expenses because of the existing contract for work in the same area. (J. A. 23).

The Comptroller General was of the view that the Army was under the duty of advising appellant of its intention to terminate the existing contract. He stated that while it appeared that the District Engineer was not aware of that intention, it did not appear that other officials of the Department of Army were equally unaware. (J. A. 26). The Comptroller General was further of the view that negotiation of the contract necessarily included execution of the contract and contract documents. These would have to be executed by an officer of the corporation, and there was neither actual nor implied authority in the employees of the appellant who participated in the conference with the District Engineer on October 12, 1951, to perform these functions (J. A. 26-8). Accordingly, said conference did not "have the effect of converting the contractor's proposal to a firm bid the purported acceptance of which created a contract." (J. A. 28) The notice of award constituted no more than an offer by appellee to award a contract. The unqualified acceptance of the appellant would be necessary in order for a contract to be consummated (J. A. 28).

The Comptroller General concluded as follows: "Hence, under the facts developed from the evidence presented here, and considering the ambiguities, uncertainties, and confusion which attended the entire transaction, there appears no clearly sound basis for concluding that a contract was ever consummated, or that John McShain, Inc., has incurred any liability under its bid." (J. A. 29)

STATUTES AND RULES INVOLVED

Statutes

1. 28 USC 1291 - Final decisions of district courts. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.

2. 28 USC 2107 - Time for appeal to court of appeals. Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

* * * * *

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

* * * * *

Rules

1. Rule 12(c) F.R.C.P. - Motion for Judgment on the Pleadings.

After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,

and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

2. Rule 54(b) F.R.C.P. - Judgment Upon Multiple Claims.

When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. As amended Dec. 27, 1946, effective March 19, 1948.

3. Rule 58 F.R.C.P. - Entry of Judgment.

Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs. As amended Dec. 27, 1946, effective March 19, 1948.

4. Rule 79(a) and (b) F.R.C.P. 79. - Books and Records Kept by the Clerk and Entries Therein.

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

STATEMENT OF POINTS

1. The order striking most of the defenses was as to such defenses a final judgment or decision or order from which an appeal lies. (But see Point I of Summary of Argument and Argument.)

2. The Court erred in holding that the Fourth Defense did not constitute a good and provable defense.

(a) The Court erred in holding that the documents attached to the Complaint (1, appellee's written Request for Proposal and 2, appellant's written Contractor's Proposal, and 3, Appellee's written Notice of Award and Notice to Proceed) did not provide for negotiations before a contract could be made.

(b) The Court erred in holding that appellant could not prove by extrinsic evidence that said documents did contain such provision.

(c) The Court erred in holding that appellant's Contractor's Proposal was an unconditional offer to do the work at the price and under the conditions therein stated.

(d) The Court erred in not holding that said Proposal was only an offer by appellant to negotiate a construction contract.

(e) The Court erred in holding as not a good and provable equitable defense Fourth Defense (b) that appellee accepted appellant's Proposal which it knew was based partly on continuation of an existing contract with appellee and withheld from appellant its intention to cancel said contract.

3. The Court erred in holding as a matter of law that the decision of the Comptroller General could not be a binding award.

SUMMARY OF ARGUMENT

I

Appellant is not able to present a convincing argument that this appeal lies. A statement of considerations bearing on the question appears in the argument. Appellant feels a ruling on this case is necessary to protect its interests, because of the consequences if it should eventuate that an appeal now lies and was not taken.

II

There was no agreement and no contract.

(a) The documents attached to the complaint show without ambiguity that there could be no contract until there were negotiations. Appellee's Request for Proposals (J.A. 2) stated that appellant's Proposal would be received "for the purpose of negotiating a construction contract". Appellant's Proposal (J.A. 12) stated it was being submitted "in compliance" with the Request. This is a plain promise by appellee to negotiate. The reservations in the documents of a right of the government to accept any proposal (J.A. 17), or to reject any proposal and negotiate with any proposer (J.A. 2), do not qualify or contradict the promise to negotiate with appellant. Yet appellee, without negotiating, issued its "Notice of Award and Notice to Proceed" (J.A. 18) in purported acceptance of appellant's Proposal. The promise to negotiate is stated without ambiguity in the documents themselves.

(b) Even if there were ambiguity in the documents, that very fact calls into application a recognized exception to the parol evidence rule so that appellant could prove the meaning of the documents by evidence extrinsic of the documents themselves, and could also prove the additional allegations in the Amended Answer that before appellee mailed its written Request for Proposals it represented to prospective bidders that the Proposals received would not be final as to the conditions and price stated therein but that negotiations would be had as to final conditions and price. (J.A. 19).

Under these circumstances it is clear that the allegations if proved show: The proposal submitted by appellant was an offer to negotiate with appellee for a contract, and not a firm bid on the terms and price stated therein; the notice of award sent appellant by appellee was an offer by appellee to contract on the terms stated in appellant's proposal; and in order to consummate a contract appellant's acceptance would be necessary, which was never forthcoming. Hence there was no contract.

III

Appellee could not hold appellant to a proposal submitted in ignorance of a relevant fact known to appellee and withheld from appellant.

The Fourth Defense (b) in the Amended Answer (J. A. 19-20) stated that in submitting its proposal appellant relied on the continuation in force of an existing contract with appellee for work in the same area; that appellee knew this; that appellee was intending to cancel the existing contract; and that appellee withheld notice to appellant of its intention to cancel, and accepted appellant's proposal submitted in ignorance of appellee's intention to cancel.

This is a good equitable defense. Although it is stated in the Amended Answer in terms of appellee's withholding relevant information from appellant, it is argued on this appeal that equity should not permit the contract to stand on the basis of a proposal submitted before a radical change in circumstances caused by appellee, as the result would be an unconscionable hardship.

In striking appellant's Sixth Defense the Court necessarily held as a matter of law that there could be no binding award on reference of the dispute to the Comptroller General by appellee. But the law at that time did not prohibit agreements whereby the government and private contractors bound themselves to abide by a decision of an officer to whom they agreed to submit their differences, whether fact or law questions were involved. Since then legislation has invalidated references of law questions; but that very fact tends to show the law permitted them before, and the Supreme

Court had decided so in 1950, a year before the reference to the Comptroller General in this case. Hence appellant should be permitted to show if he can that the reference in this case made the decision binding on appellee.

ARGUMENT

I. Is the Order Appealed from a Final Order, Judgment or Decision?

Appellant for this point has posed a question rather than stated a proposition, for the reason that appellant is not able to present what it regards as a convincing argument that the order appealed from is a final order from which an appeal lies. On the other hand, counsel for appellant cannot in conscience subject appellant to the risk of the consequences of a mistaken forecast as to how the law will affect appellant's right of review in the unpredictable future. It is therefore the part of caution that the law for this case be established. At the same time it is recognized that this court should not be burdened with unnecessary argument. Points II, III, and IV are unnecessary argument if Point I is decided adversely to appeal. Accordingly, pains have been taken in this brief to refer the reader as soon as possible to this Point I in the Summary of Argument and the Argument, and to state frankly therein appellant's position on this Point I. The remaining discussion on this point will deal with items of consideration which have been productive of doubt and misgiving rather than of conviction.

The Complaint (J. A. 1) alleged that appellee issued its Request for Proposals (Exhibit A to the Complaint, J. A. 2); that appellant submitted to appellee its Contractor's Proposal (Exhibit B to the Complaint, J. A. 12); that appellee sent appellant its Notice of Award and Notice to Proceed (Exhibit C to the Complaint, J. A. 18); and that appellant did not proceed with the work and by reason thereof appellee was damaged in the amount of \$396,202.00.

The Amended Answer to the Complaint (J. A. 19) set up seven defenses as follows:

1. No ground upon which relief could be granted;
2. Admission that documents passed between the parties as alleged and that appellant did not do the work;
3. Denial of damages;
4. Appellee promised to negotiate on the basis of appellant's proposal, but instead treated the proposal as a firm bid and "accepted" it without negotiating;
5. Alternative defense that if a contract was made, it should be rescinded for appellant's excusable mistake;
6. Appellee referred the dispute between the parties to the Comptroller General who decided in favor of appellant;
7. There was no agreement, and therefore, no contract.

The order of the Court (J.A. 30-1) disposed of the seven defenses as follows:

1. Struck as legally insufficient;
2. No ruling. (This defense was all admissions);
3. Issue of damages to be tried separately, depending on outcome of item 5;
4. Struck as legally insufficient;
5. Treated as an affirmative defense and set down for separate trial to be followed, if appropriate, by trial on 3 above;
6. Struck as legally insufficient;
7. Struck as legally insufficient.

As applied to this case, 28 USC 2107 would prohibit review after either 60 or 90 days from March 29, 1956, if the District Court's order of that date is a "judgment, order or decree" within the meaning of that statute.

The "judgment, order or decree" covered by said statute is the "final decision" of District Courts over which Courts of Appeals have jurisdiction by virtue of 28 USC 1291.

The litigant affected by an order must therefore determine at his peril whether the order is a "final decision."

The time for taking an appeal runs from the "entry of the judgment" (Rule 73(a)) which occurs (Rule 58) when the clerk of the court pursuant to Rule 79(a) makes a "notation of the judgment," until which time, according to said Rule 58, the judgment is not effective. Rule 79(a) makes it the duty of the clerk to make the notation of all "papers, process, appearances, orders, verdicts, and judgments"; but the courts have held that the primary duty to see that the notations of orders made by the Clerk of the Court are correct at all times "rests upon the litigants". Fast, Inc. v. Shaner, Inc., 181 F. 2d 937 (CCA 3, 1950). This court has adopted that view and language of the Third Circuit in O'Brien v. Harrington, #12,298, decided April 12, 1956.

Rule 54(b) authorizes the District Courts to enter judgment on fewer than all the claims of a multiple-claim suit for relief, only upon an express determination that there is no just reason for delay, absent which the ruling shall not terminate the action as to any part of the claim.

However, this Court has held that an order, determination and entry of judgment by the Court under Rule 54(b) is not final as to establishing jurisdiction for review; and dismissed the appeal taken from such supposed "final decision." Gold Seal Co. v. Weeks, 93 U.S. App. D.C. 249, Par. 6, 209 F. 2d 802 (1954). In so holding, this Court specifically rejected the Third Circuits' rule in Bendix Aviation v. Glass, 195 F. 2d 267 (CCA 3, 1952). The order and entry of judgment in the Gold Seal case which this court refused to review were made by the District Court on its own motion, but this court did not comment on that fact. Hence the positive exercise by the District Court on its own motion of the function, provided for in Rule 54(b) of making a ruling, determining there is no just reason for delay, and entering judgment on some but not all multiple claims, does not establish a basis for review in this jurisdiction.

The foregoing are some of the considerations which have vexed appellant. No conclusion is claimed for them. For instance, it cannot be concluded on the basis of the immediately foregoing references to

Rule 54 (b) that appellee's complaint was a multiple-claim suit; nor that this Court has intimated that the failure of a District Court to enter judgment under Rule 54 (b) is "not binding" on this Court so that an order not entered as a judgment would be declared a "final decision." Nevertheless, sufficient doubt has been found as to the existing state of the law of review to create apprehension as to how future interpretation, legislation and rule-making may affect the appellant's privilege of review in this case.

II. There Was No Agreement And No Contract.

(a) The documents show without ambiguity that there could be no contract until there were negotiations; and there were no negotiations.

(b) Even if there is ambiguity in the documents, appellant could resolve it by evidence extrinsic of the documents.

There was no contract. It is obvious that there was no contract if the allegations of the Fourth Defense (a) in appellant's Amended Answer to the Complaint (J.A. 19) are true. It is alleged in that Defense that appellee before issuing its Request for Proposals represented to prospective bidders that the conditions and price which would be stated in such Proposals would not be final but that after the proposals were opened negotiations would be conducted for the purpose of determining what the final conditions and price would be; and that in its formal Request for Proposals appellee again represented that the Proposals would be received for the purpose of negotiating a contract. It is further alleged that this procedure was identical with a previous transaction between the parties wherein negotiations resulted in a final agreement different in conditions and price from those stated in the proposals.

No argument is needed for the proposition that the facts above stated demonstrate that there could be no contract until there had been negotiations.

This point will be discussed on the basis (a) that the documents show without ambiguity that negotiations were necessary before there could be a contract, and (b) that if not, an ambiguity exists which creates an exception to the parol evidence rule so that the provision for negotiations can be established by evidence extrinsic of the documents.

(a) The documents attached to the complaint establish the above facts without ambiguity.

The documents are a Request for Proposals, the Contractor's Proposal, and the Notice of Award and Notice to Proceed.

1. The Request for Proposals contained in its first sentence a statement that the Proposals submitted in compliance therewith would be received "for the purpose of negotiating a construction contract." (J.A. 2) It reserved in Paragraph 3 the right of the government, as its interest might require, "to reject any and all proposals and to negotiate with any proposer."

Certainly the right to reject and negotiate did not confer the right to accept and not negotiate nor qualify the promise to negotiate.

2. The Contractor's Proposal in its first sentence stated: "In compliance with your Request for Proposals ***** the undersigned hereby proposes to furnish the plant, labor materials and equipment and perform all work for the above-described project ****" (J.A. 12) It contained in its last sentence a "CONDITION" reading as follows:

CONDITION: Bidders are advised that the award for this work will be made to one Bidder on Proposal Nos. 1 and 2. The right is reserved, as the interest of the Government may require, to accept or re-any or all items of any proposal. (J.A. 17).

Obviously the Proposal must be read in conjunction with the Request, "In compliance with" which it was submitted. So read, it clearly states that it is submitted for the purpose of negotiating a contract.

The reservation in the "CONDITION" of the right to accept¹ any or all items of any proposal does not refer to the promise to negotiate. It is not inconsistent with such promise. The appellee could negotiate as promised, and still accept any or all items of any proposal. The fact that that reservation is for the benefit of appellee only -- if it be so interpreted -- would give the appellee the right not to accept as well as to accept, as its interest might require. It still does not appear how the reservation could give appellee the right not to negotiate. The most likely purpose of the reservation appears to be to allow the government to accept portions of any proposal. But that is not clear either, as will presently appear.

3. The third document attached to the complaint was the Notice of Award and Notice to Proceed. (J.A. 18) This appears to lend no assistance in determining whether or not negotiations were necessary before a contract could be made.

Accordingly, it is submitted that a reading of the documents demonstrates that a positive provision was made that the proposal when submitted would be an offer to negotiate and not a firm bid, and that nothing appears in the documents to qualify that positive provision. See Noce v. Edward Morgan, 106 F. 2d 746 (CCA 8, 1939).

(b) Even if in the documents there is an ambiguity as to the provision for negotiation, an exception is thereby created to the parol evidence rule so as to permit proof of the fact by extrinsic evidence.

Ambiguities in documents, and the true purpose in executing documents, may be proved by extrinsic evidence. Fox v. Johnson & Wimsatt, 75 U.S. App. D.C., 211, Note 12, 127 F. 2d 729; Murray v.

¹ Some doubt is left as to the full meaning of the "CONDITION" by the apparent omission of letters which were intended to follow the prefix "re ____". Probably Appellee at trial could readily prove -- by extrinsic evidence -- that the word was intended to be "reject" and the phrase was intended to reserve in the government the right to accept or "reject" any or all items of any Proposal. For that brief purpose appellant would gladly loan appellee its authorities on this point, reserving the right, as its interest might require, to contend that the appellee's right to "reject" appellant's Proposal did not give appellee the right to "re-create" "re-form", or "re-frame" appellant's offer to negotiate into a firm bid.

Gadsden, 91 US App DC 38, 197 F 2d 194, 33 ALR 2d 554; Harrington v. Emmerman, 88 US App DC 23, 186 F2d 757; Compton v. Atwell, 98 US App DC 99, 207 F2d 139; United States v. Northern Pacific Ry. Co., 188 F2d 277, 280 (CCA/8,1951); Peugh v. Davis, 96 US 332, 336; 24 L.ed.775(1887).

The parol evidence rule relates to the meaning of words which the parties have selected to go into a written contract between them. It does not apply to the broad question whether a contract was made at all. The application of the rule therefore "presupposes the existence of an existing, valid, written contract." 20 Am Jur 954, Sec. 1091.

While it is doubtful that there is ambiguity between the first sentence of the "Request for Proposals" (JA 2) and the "CONDITION" (J.A. 17), ~~there~~ seems to be little doubt that there is ambiguity between the two sentences which make up the "CONDITION" itself. The first sentence of the "CONDITION" states that the award would be made to one bidder on Proposal Nos. 1 and 2. (Proposals 1 and 2 constituted the whole job). The next sentence states that the government reserves the right to accept any item of any proposal. The confusion is within the CONDITION itself, which should weaken further its power to qualify the positive provision for negotiations.

III. Appellee could not hold appellant to a proposal submitted in ignorance of a relevant fact which appellee withheld from appellant.

The Fourth Defense (b) in appellant's Amended Answer (J.A. 19-20) was as follows:

(b) At the time the defendant submitted its proposal, defendant was already engaged on a Camp Ritchie project covered by the earlier contract referred to above. This project was located near the project which is the subject of this suit, and defendant had its office organization and equipment and facilities set up there, which would make it less expensive to carry on this second project. In submitting its proposal, defendant took these facts into account and relied upon the continuation of its then existing contract. Unknown to the defendant, the plaintiff was contemplating terminating the major portion

of that project, and did so after issuing the Notice of Award and Notice to Proceed.

Plaintiff nevertheless issued its "notice of award and notice to proceed" as alleged in Paragraph 4 of the complaint, when it knew or should have known all the facts stated in this sub-paragraph and did not inform the defendant of its intentions.

In addition to the foregoing allegations, reasonable inferences are permissible that a relationship of mutual trust had grown up between the parties; that appellant expected appellee's representatives on the site to be instantly aware of any intention on the part of appellee to cancel the existing contract and anticipated that appellee would promptly inform appellant of any such intention before appellant's proposal was submitted, or would not accept the proposal if appellee's intention then was to cancel the existing contract.

Aside from these considerations, it would be just as damaging to appellant, and equally inequitable, were the Court to permit appellant's proposal to stand when for whatever reason the conditions under which the proposal was submitted had undergone a substantial change which neither appellee nor appellant could anticipate.

Cf. United States v. Sunshine Dairy, Inc., 215 F 2d 879 (CCA 9, 1954); Moffett, Hodgkins and Clarke Company v. Rochester, 178 U.S. 373, 44 L.ed. 1108 (1900); State of Connecticut v. F. H. McGraw & Co., 41 F. Supp. 369 (opinion by Judge Charles E. Clark), Kemp v. United States, 38 Fed. Supp. 568 (Dist. Ct. Md 1941).²

² Appellant desires to note here for the information of the individuals concerned a fact which it is not necessary to explain to the Court. The allegations referred to were not intended to intimate or suggest lack of forthrightness on the part of any individual. Appellee anticipates that if these allegations are proved it will be on the basis that the agents of appellee who dealt with appellee were ignorant of appellee's intention to cancel the existing contract, and those who handled the cancellation were ignorant of the dealings with the appellant.

IV. It Cannot Be Said As a Matter of Law That the Decision of The Comptroller General Was Not a Binding Award.

The Sixth Defense of the Amended Answer (J.A. 21-2) was as follows:

"Defendant presented the facts in this case to the Secretary of the Army. The Secretary of the Army on January 11, 1952, wrote a letter to the Comptroller General of the United States with enclosures requesting a decision. On February 12, 1952, the Comptroller General decided on the basis of the facts developed from the evidence presented that no contract was ever consummated and that the defendant had incurred no liability under its bid. A copy of said letter of the Comptroller General is attached hereto and made a part hereof as Exhibit A."

In striking this defense as legally insufficient, the Court necessarily held as a matter of law that the decision of the Comptroller General could not be a binding award. Appellant argues that it could have been a binding award at the time it was referred to the Comptroller General and at the time he made his decision, depending on the circumstances under which the submission was made to him.

In 1951 and 1952 when this matter was referred to the Comptroller General for decision, disputes as to fact questions and law questions could by agreement between the government and a private party to a contract be referred to an officer whose decision would be final and binding on the government as well as the other party to the contract. United States v. Moorman, 338 U.S. 457, 462, 94 L ed 256, 260, decided January 9, 1950. It does not appear that the decision or any statutory reference in the decision limited the class of officer to whom such disputes might be referred. Indeed, it is stated in an article by J. Edward Welch, Esquire, Assistant General Counsel, General Accounting Office, appearing in the Federal Bar Journal for October-December, 1954 Vol. XIV No. 4, pp. 321-329, that in the years 1952 and 1953 it was found in a number of cases that "the low bidder had submitted a qualified bid which legally could not be accepted.", and reference is made as examples to B-112329, March 3, 1953; B-113480, May 11, 1953; B-117452, November 30, 1953. (Id. 329).

Congress considered legislation to be necessary to prohibit references of legal questions for determination, and on May 11, 1954, enacted that "No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board." Act of May 11, 1954, Public Law 356, Ch. 199, 83rd Congress, 2nd Session. See House Report No. 1380, March 22, 1954 (to accompany S. 24, 83rd Congress, 2nd Session.)

Appellant should be permitted to prove the circumstances under which the reference in this case was made to the Comptroller General, since agreements making such references and the resulting decisions binding on both parties were legally permissible when the disputes between appellant and appellee arose and when the reference of the question was made by appellee to the Comptroller General. The circumstances might also bring into application statutory provisions such as 31 USC 71, which lodges in the General Accounting Office the settlement and adjustment of all "claims and demands by the Government of the United States or against it."

CONCLUSION

Appellant respectfully submits to this Court for decision the question whether an appeal lies from the Order of the District Court of March 29, 1956. (J.A. 30). If it does, it is submitted that the Order was erroneous and should be reversed.

Respectfully submitted,
CHARLES B. MURRAY
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Washington 6, D. C.

GEORGE F. SHEA
Tower Building
Washington 5, D. C.

Attorneys for Appellant

(i)

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JOINT APPENDIX

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed March 12, 1954]

UNITED STATES OF AMERICA :
Plaintiff :
v. : CIVIL ACTION NO. 1066-'54
JOHN McSHAIN, INC. :
Defendant :

COMPLAINT FOR MONEY JUDGMENT

1. This court has jurisdiction of this action by virtue of Title 28, United States Code, section 1345.

2. Plaintiff issued to defendant, among others, a Request for Proposals dated September 14, 1951, copy of which is annexed as Exhibit A; [detail specifications omitted].

3. Defendant thereafter submitted to plaintiff a Contractor's Proposal dated October 2, 1951, copy of which is annexed as Exhibit B.

4. Plaintiff thereafter executed and sent to defendant and defendant received a Notice of Award and Notice to Proceed dated October 12, 1951, copy of which is annexed as Exhibit C.

5. Defendant did not, within the time limited therefor, or thereafter, proceed with the work described in the Exhibits annexed.

6. By reason of defendant's failure to proceed as provided by the contract thus made, plaintiff was damaged in the sum of \$396,202.00.

WHEREFORE, plaintiff demands judgment in the amount of Three Hundred Ninety-Six Thousand Two Hundred and Two Dollars (\$396,202.00) together with interest and costs and such other and further relief as this court shall deem proper.

2

/s/ Leo A. Rover
United States Attorney
Washington, D. C.

/s/ Warren E. Burger
Assistant Attorney General
Civil Division

PLEASE TAKE NOTICE that plaintiff demands trial by jury in this action.

RESTRICTED (Exhibit A) ENG-49-080-52-13-(15)

PROPOSAL NO. _____ BIDDER _____

(Do not write above this line)

REQUEST FOR PROPOSALS

U. S. ARMY
CORPS OF ENGINEERS
OFFICE OF THE DISTRICT ENGINEER
WASHINGTON DISTRICT
FIRST AND DOUGLAS STREETS, N. W.
WASHINGTON 25, D. C.

14 September 1951

PROJECT: Camp Ritchie Project
Primary Site
In the vicinity of
Camp Ritchie, Maryland

1. Proposals in duplicate will be received until 3:00 p. m. Eastern Standard Time, 2 October 1951, for the purpose of negotiating a construction contract for furnishing all plant, labor, materials and equipment and performing all work for the above-described project in strict accordance with the specifications, schedules, addenda and drawings as follows:

Specification - ENG 49-080-52-13-(15) dated 14 September 1951.

Drawings as designated in Paragraph SC-2 of Part III of the
above-referenced specifications.

All addenda to these specifications and schedules and drawings listed herein that may be issued prior to opening of proposals.

2. Proposals will be submitted in sealed envelopes upon the attached Form and marked in the upper left hand corner "Proposal under Serial No. ENG 49-080-52-13-(15), the serial number indicating the project for which the proposal is submitted. The proposer who is awarded the Contract will be required to execute the Department of the Army Contract Form for construction (R-5701), a copy of which is available in the District Engineer Office, Washington District, designated above.

3. The right is reserved, as the interest of the Government may require, to reject any and all proposals and to negotiate with any proposer.

- 4 9. Security Controls: Plans and specifications will not be released for precontract negotiations until the prospective contractor and sub-contractors have executed a security agreement (D.D. Form 441) and it has been determined by the Contracting Officer that they meet all necessary security requirements.

All proposals delivered in person or by messenger must be left in the Mail Room, Room 212, in the Administration Building, not later than the time set for receiving proposals.

RP - 3

RESTRICTED

5

RESTRICTED

ENG - 49 - 080 - 52 - 13 - (15)

SPECIFICATIONS

PART I

STATEMENT OF WORK

SW-1 DESCRIPTION OF WORK:

- a. Work To Be Done: (See Article 1 of the Contract).

The work consists in furnishing all plant, labor and materials and performing all work in strict accordance with these specifications and the schedules and drawings forming parts thereof for the construction, and completion of the

CAMP RITCHIE PROJECT

PRIMARY SITE

In general, the main items of work will consist of the following:

Miscellaneous rock excavation; Building located in the rock chambers and other structures; Installation of roof bolts; concrete lining of tunnel walls and arches; cement grouting of tunnel arches; protective cement mortar coating on tunnel walls and arches and rock chamber walls and arches; cut-and-cover concrete tunnel sections, wingwalls, portals and parapets; backfilling of concrete cut-and-cover tunnel sections; wingwalls and portals; blast doors and gas seal doors; reservoir; utilities and

their structures below the tunnel roadway and sidewalks; tunnel roadway paving, curbs and sidewalks; supervising separate elevator and ventilating and air-conditioning contracts; cooling water towers; shaft headhouses; guard houses; sewage treatment plant; sewers; water lines; main electric feeder conduits and cables; access road paving; fencing; the installation of all interior and exterior utilities, complete and ready for service, all as shown on the drawings and specified.

b. Work Not Included: The following work is not included in this contract:

- (1) Cooling water towers, foundations and houses
- (2) Elevator installation
- (3) Ventilating and Air-conditioning system

c. Location: The site of the work called for in these specifications is located at Raven Rock Mountain in the vicinity of Camp Ritchie, Maryland and Waynesboro, Pennsylvania.

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PART II

GENERAL CONDITIONS

GC-1 SCOPE OF WORK: The work to be performed under this contract consists of furnishing all plant, materials, equipment, supplies, labor and transportation, including fuel, power, water (except any materials, equipment, utility or service, if any, specified herein to be furnished by the Government), and performing all work as required by Article 1 of the contract, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof, and including such detail drawings as may be furnished by the Contracting Officer from time to time during the prosecution of the work in explanation of said drawings.

GC-2 CHARACTER OF WORK AND MECHANICS: The work shall be executed in the best and most workmanlike manner by qualified, careful and efficient mechanics in strict accordance with the drawings and specifications.

GC-3 SITE INVESTIGATION AND REPRESENTATIONS: The contractor acknowledges that he has satisfied himself as to the nature and

location of the work, the general and local conditions, particularly those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads and uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during the prosecution of the work and all other matters upon which information is reasonably obtainable and which can in any way affect the work or the cost thereof under this contract. The contractor further acknowledges that he has satisfied himself as to the character, quality and quantity of surface and sub-surface materials to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from information presented by the drawings and specification made a part of this contract. Any failure by the contractor to acquaint himself with all the available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government assumes no responsibility for any understanding or representations made by any of its officers or agents during or prior to the execution of this contract, unless (1) such understanding or representations are expressly stated in the contract and (2) the contract expressly provides that the responsibility therefor is assumed by the Government. Representations made but not so expressly stated and for which liability is not expressly assumed by the Government in the contract shall be deemed only for the information of the contractor.

7 GC-4 OPERATIONS AND STORAGE AREAS: (a) All operations of the contractor (including storage of materials) upon Government premises shall be confined to areas authorized or approved by the Contracting Officer. Nonauthorized or unwarranted entry upon or passage through, or storage or disposal of materials shall be made upon Government premises. Government premises adjacent to the construction will be made available for use by the contractor without cost whenever such use will not interfere with other Government uses or purposes. The

contractor shall be liable for any and all damage caused by him to such Government premises. The contractor shall hold and save the Government, its officers and agents, free and harmless from liability of any nature or kind arising from any use, trespass or damage occasioned by his operations on premises of third persons.

(b) Temporary buildings (storage sheds, shops, offices, etc.) may be erected by the contractor only with the approval of the Contracting Officer, and shall be built with labor and materials furnished by contractor without expense to the Government. Such temporary buildings and/or utilities shall remain the property of the contractor and will be removed by him at his expense upon the completion of the work. With the written consent of the Contracting Officer, such buildings and/or utilities may be abandoned and need not be removed.

(c) The contractor shall, under regulations prescribed by the Contracting Officer, use only established roadways or construct and use such temporary roadways as may be authorized by the Contracting Officer. Where materials are transported in the prosecution of the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any federal, state or local law or regulation. When it is necessary to cross curbing or sidewalks, protection against damage shall be provided by the contractor and any damaged roads, curbing, or sidewalks shall be repaired by, or at the expense of the contractor.

GC-5 PROGRESS CHARTS, AND REQUIREMENTS FOR OVERTIME WORK: (a) The contractor shall within 5 days or within such time as determined by the Contracting Officer, after date of commencement of work, prepare and submit to the Contracting Officer for approval a practicable schedule, showing the order in which the contractor proposes to carry on the work, the date on which he will start the several salient features (including procurement of materials, plant and equipment) and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion at any time. The con-

tractor shall enter on the chart the actual progress at the end of each week or at such intervals as directed by the Contracting Officer, and shall immediately deliver to the Contracting Officer three copies thereof.

(b) The contractor shall furnish sufficient forces, construction plant and equipment, and shall work such hours, including night shifts and overtime operations, as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the Contracting Officer, the contractor falls behind the progress schedule the contractor shall take such steps as may be necessary to improve his progress and the Contracting Officer may require him to increase the number of shifts, and/or overtime operations, days of work, and/or the amount of construction plant, all without additional cost to the Government.

(c) Failure of the contractor to comply with the requirements of the Contracting Officer under this provision shall be grounds for determination by the Contracting Officer that the contractor is not prosecuting the work with such diligence as will insure completion within the time specified. Upon such determination the Contracting Officer may terminate the contractor's right to proceed with the work, or any separable part thereof, in accordance with the delays-damage article of the contract.

GC-6 SUBCONTRACTORS: At the request of the Contracting Officer the contractor shall notify the Contracting Officer in writing of the names of all subcontractors proposed for the work, together with the extent and character of the work to be done by each subcontractor. The contractor or subcontractor shall, within 7 days after the making of any subcontract, deliver to the Contracting Officer an affidavit setting forth the name and address of his subcontractor and a summary description of the precise work subcontracted. If for sufficient reason, at any time during the progress of the work, the Contracting Officer determines that any subcontractor is incompetent or undesirable, he will notify the contractor accordingly and immediate steps will be taken for cancellation of such subcontract. Subletting by subcontractors shall be subject to the same regulations. Nothing contained in this contract shall create any contractual relation between the subcontractor and the Government.

GC-7 SAMPLES AND DESCRIPTIVE DATA: (a) Any samples and descriptive data required shall:

(1) Be submitted within the time specified in these specifications or, if no time be specified, within a reasonable time before use to permit inspection and testing.

(2) Be shipped prepaid and delivered as specified in these specifications, or as directed by the Contracting Officer.

(3) Be properly marked to show the name of the material, trade name of manufacturer, place of origin, name and location of the work where the material represented by the sample is to be used, and the name of the contractor submitting the sample.

(b) Samples not subjected to destructive tests may be retained until completion of the work but thereafter will be returned to the contractor, if he so requests in writing, at his own expense. Failure of any sample to pass the specified requirements will be sufficient cause for refusal to consider further any samples from the same manufacturer whose materials failed to pass the tests.

9 **GC-8 PROTECTION OF MATERIAL AND WORK:** The contractor shall at all times protect and preserve all materials, supplies and equipment of every description (including property which may be Government-furnished or owned) and all work performed. All reasonable requests of the Contracting Officer to inclose or specifically protect such property shall be complied with. If, as determined by the Contracting Officer, material, equipment, supplies and work performed are not adequately protected by the contractor such property may be protected by the Government and the cost thereof may be charged to the contractor or deducted from any payments due to him.

GC-9 PRESERVATION OF EXISTING VEGETATION: (a) The contractor will preserve and protect all existing vegetation such as trees, shrubs, and grass on or adjacent to the site which do not unreasonably interfere with the construction as may be determined by the Contracting Officer. The contractor will be responsible for all unauthorized cutting or damaging of trees and shrubs, including damage due to careless

operation or equipment, stock piling of materials or tracking of grass areas by equipment.

(b) Care will be taken by the contractor in felling trees authorized for removal to avoid any unnecessary damage to vegetation that is to remain in place. Any limbs or branches of trees broken during such operations shall be trimmed with a clean cut and painted with an approved tree pruning compound if required by the Contracting Officer. The contractor will be liable for or may be required to replace or restore at his own expense all vegetation not protected and preserved as required herein that may be destroyed or damaged.

GC-10 POSSESSION PRIOR TO COMPLETION: The Government shall have the right to take possession of or use any completed or partially completed part of the work. Such possession or use shall not be deemed an acceptance of any work not completed in accordance with the contract. If such prior possession or use by the Government delays the progress of the work or causes additional expenses to the contractor, an equitable adjustment in the contract price and/or the time of completion will be made and the contract shall be modified in writing accordingly.

GC-11 SUSPENSION OF WORK: The Contracting Officer may order the contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the progress of the work and causes additional expense or loss to the contractor, no increase in contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time causing additional expense or loss, not due to the fault or negligence of the contractor, the Contracting Officer shall make an equitable adjustment in the contract price and modify the contract accordingly. An equitable extension of time for the completion of the work in the event of any such suspension will be allowed the contractor provided however, that the suspension was not due to the fault or negligence of the contractor.

10 Provided, further, that no suspension will be ordered or adjustments made under this paragraph for delays arising as the result of changes

ordered or as the result of changed conditions encountered under the respective articles relating to Changes and Changed Conditions or as the result of any delays for which an extension of time may be granted under the Delays - Damages Article of this contract.

GC-12 LABOR REPORTS: The contractor shall promptly furnish, and shall cause any subcontractors to furnish in like manner, within 7 days after the regular payment date of each weekly payroll, to the Contracting Officer, a copy of such pay roll together with a sworn affidavit with respect to the wages paid each of its employees (which shall not be deemed to apply to persons in classifications higher than laborers and mechanics and those who are the immediate supervisors of such employees) engaged on the work. The contracting agencies shall accumulate these weekly affidavits and submit them directly to the Office of the Solicitor, United States Department of Labor, Washington 25, D. C. , on a quarterly basis, for the quarterly periods ending 31 March 30 June, 30 September and 31 December. The contractor shall also prepare and furnish such of the labor reports as may be required by the Department of Labor.

GC-13 CLEANING UP: The contractor shall at all times keep the construction area, including storage areas used by him, free from accumulations of waste material or rubbish and prior to completion of the work remove any rubbish from and about the premises and all tools, scaffolding, equipment, and materials not the property of the Government. Upon completion of the construction the contractor shall leave the work and premises in a clean, neat and workmanlike condition satisfactory to the Contracting Officer.

GC-14 USE OF DOMESTIC ARTICLES: Because the materials listed below, or the materials from which they are manufactured, are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, their use in the work herein specified (subject to the requirements of the specifications) is authorized without regard to the country of origin:

Aluminum

Mercury

Antimony	Mica
Asbestos	Nickel
Bauxite	Platinum and related group met.
Chrome ore or Chromite	Rubber, crude and latex
Copper	Timber, balsa, greenheart
Damar Gum	Lignum Vitae, mahogany, and teak
Jute and Jute burlaps	Tin
Kaurigum	Tungsten
L Lac and Shellac	Zinc
Lead	

- 11 GC-15 DEFINITIONS: Wherever in the specifications or upon the drawings the words directed, required, ordered, designated, prescribed, or words of like import are used, it shall be understood that the direction, requirement, permission, order, designation, or prescription of the Contracting Officer is intended and similarly the words approved, acceptable, satisfactory, or words of like import shall mean approved by, or acceptable to, or satisfactory to the Contracting Officer, unless otherwise expressly stated.

[Filed March 12, 1954]

Bid No. (Exhibit B)

12

Serial No. ENG-49-080-52-13-(15)

CONTRACTOR'S PROPOSAL

Date 2 October 1951

TO: Office of the District Engineer
Corps of Engineers
U. S. Army
First and Douglas Streets, N. W.
Washington 25, D. C.

PROJECT: CAMP RITCHIE PROJECT
PRIMARY SITE
IN THE VICINITY OF
CAMP RITCHIE, MARYLAND

In compliance with your Request for Proposals dated 14 September 1951 the undersigned hereby proposes to furnish the plant, labor, materials and equipment and perform all work for the above-described project

in strict accordance with the specifications, schedules, drawings and addenda.

Addendum No. 1 dated September 20, 1951

" " 2 dated September 20, 1951

" " 3 dated September 25, 1951

" " 4 dated September 26, 1951

(Bidder shall insert Addenda Nos.; if none,
so state)

for the consideration of the following prices:

PROPOSAL NO. 1: Construction and completion of the CAMP RITCHIE PROJECT - PRIMARY SITE, complete including the underground building; gas seal doors; blast doors and machinery and decontamination chambers; reservoir; water, sewer, drainage, electric and telephone pipes, conduits and appurtenances below the tunnel roadway; tunnel roadway paving, curbs, sidewalks and railings; protective coating of cement mortar on walls and roof of rock chambers and unlined portions of tunnel, supervision of separate elevator and ventilation and air conditioning system contracts; Baffle construction and part lining of ventilation shafts; headhouses at ventilation and diesel-engine exhaust shafts; cooling water towers; guard houses; sewage treatment plant; access road paving; fencing; installation of government furnished equipment and materials not including U. S. Army Signal Corps equipment; and all exterior and interior utilities, all as shown on the drawings and specified exclusive of the unit price items of work as set forth under proposal No. 2, for the consideration of

_____ Dollars (\$4,822,200)

PROPOSAL NO. 2: Construction and completion of the **UNIT PRICE ITEMS OF WORK**, all as shown on the drawings and as specified for the consideration of the unit prices set forth in the attached schedule, Engineer Form No. 1618.

14

UNIT PRICE SCHEDULE

(To be attached to Contractor's Proposal)

Construction and completion of Dry Stone packing in sections of tunnels, which are to be lined with concrete, including steel pipe drains and placing Government furnished corrugated steel sheets and crushed stone (Items 1, 2 and 3); Concrete cut-and-cover tunnel sections including dampproofing, wing walls and portal and tunnel lining including placing of Government furnished reinforcing steel and Rubber Stops (Items 4, 5, 6, 7, 8 and 21); Grouting space above tight roof lagging in sections of the tunnel (Items 9, 10, 11, and 12); placing Government furnished rock, crushed stone; subsoil and topsoil backfill and furnishing and placing footing drains at cut-and-cover tunnel sections, wing walls and portals (Items 13, 14, 15, 16 and 17); Rock excavation within and outside the tunnel (items 18 and 19); Cement mortar lining ("Guniting") of tunnel apexes (Item 20); protective coating of cement mortar (Item 22); installation of Government furnished roof bolts (Item 23); and installation of U. S. Army Signal Corps Equipment (Items 24).

<u>Item No.</u>	<u>Description</u>	<u>Estimated Quantity</u>	<u>Unit</u>	<u>Unit Price</u>	<u>Estimated Amount</u>
1.	Dry Stone Packing, placing only	3,100	cu. yd.	\$ 4.50	\$13,950.00
2.	Corrugated Steel Sheets, placing only	56,000	sq. ft.	.15	8,400.00
3.	Steel Drain Pipes	350	Lin. ft.	1.50	525.00
4.	Class A Concrete, cut and cover tunnel sections, not including cement or aggregates	3,700	cu. yd.	40.00	148,000.00
5.	Class B concrete, tunnel lining not including cement or aggregates	11,000	cu. yd.	42.00	462,000.00

Item No.	Description	Estimated Quantity	Unit	Unit Price	Estimated Amount
6.	Reinforcing steel for cut and cover tunnel sections and tunnel lining - placing only	800,000	lbs.	\$.05	\$40,000.00
7.	Portland cement for concrete	21,500	BB1.	5.00	107,500.00
8.	High-Early-Strength Portland cement for concrete	100	BB1.	7.00	700.00
15 9.	Portland cement for grout	5,000	BB1.	5.50	27,500.00
10.	Grouting pipes	1,000	Lin. ft.	1.75	1,750.00
11.	Sand for Grout	750	Cu. yd.	2.00	1,500.00
12.	Mixing and placing grout	1,600	Cu. yd.	30.00	48,000.00
13.	Rock Backfill placing only	38,000	Cu. yd.	7.00	266,000.00
14.	Crushed Stone Backfill placing only	1,400	Cu. yd.	7.50	10,500.00
15.	Subsoil Backfill placing only	18,000	Cu. yd.	2.50	45,000.00
16.	Topsoil Backfill placing only	2,000	Cu. yd.	11.00	22,000.00
17.	6" Footing drains	1,300	Lin. ft.	2.00	2,600.00
18.	Rock excavation within tunnel	5,000	Cu. yd.	20.00	100,000.00
19.	Rock excavation outside tunnel	2,500	Cu. yd.	20.00	50,000.00
20.	Cement Mortar Tunnel Lining ("Guniting") (Sect. 1E of Specs.)	12,000	Bag	7.70	92,400.00
21.	Dampproofing, cut and cover tunnel	3,200	Sq. yd.	1.50	4,800.00
22.	Protective Coating of Cement Mortar (Sect. 3 of Specs.)	17,000	Bag	8.50	144,500.00
23.	Roof Bolts, install only	50,000	Lin. ft.	2.50	125,000.00

<u>Item No.</u>	<u>Description</u>	<u>Estimated Quantity</u>	<u>Unit</u>	<u>Unit Price</u>	<u>Estimated Amount</u>
16 24.	Installation of U. S. Army Signal Corps Equipment (Section 39 of Specs.)		Lump Sum		\$30,000.00
TOTAL (PROPOSAL NO. 2)					<u>\$1,752,625.00</u>

NOTE: All extensions of the unit prices shown will be subject to verification by the Government. In case of variation between the unit price and the extension, the unit price will be considered to be the proposal.

GRAND TOTAL (PROPOSAL NOS. 1 and 2) \$6,574,825.00

* * * * *

17 and agrees upon receipt of written notice of an award of the contract within thirty days after the date of opening of the proposal, that he will execute contract Form No. B-5701, in accordance with the proposal as accepted and if the consideration of the contract will exceed \$2,000 in amount will furnish to Government a Performance Bond on U. S. Standard Form No. 25 or U. S. Standard Form No. 25-B and a Payment Bond on U.S. Standard Form No. 25-A or U. S. Standard Form No. 25-C with good and sufficient surety or sureties as required by the specifications, at the time that the contract is executed.

It is hereby warranted that in the event award is made to the undersigned there will be furnished under this contract, or used in the performance of the work covered by the contract; only such manufactured articles, materials and supplies as have been mined or produced in the United States and only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies, mined, produced or manufactured, as the case may be, in the United States, except as noted below or otherwise indicated in this proposal or authorized in the request for proposals.

The bidder further agrees that, if awarded the contract, he will commence the work within 10 calendar days after receipt of written notice to

proceed, and that he will fully complete the entire work ready for use not later than 30 June 1952 after the date of receipt by him of notice to proceed and that he will fully complete certain portions of the work for beneficial occupancy as described in Special Conditions paragraph SC-33 not later than 1 June 1952.

Bidder represents he has not, employed or retained a company or person (other than a full time employee) to solicit or secure this contract, and agrees to furnish information relating thereto as requested by the Contracting Officer.

Bidder represents that the aggregate number of employees of the bidder and his affiliates is: x 500 or more, less than 500.

CONDITION: Bidders are advised that the award for this work will be made to one Bidder on Proposal Nos. 1 and 2. The right is reserved, as the interest of the Government may require, to accept or re any or all items of any proposal.

JOHN McSHAIN, INC.

Delaware

BY /s/ (Illegible)

Title (Illegible)

17th and Spring Garden Sts., Philadelphia, Penna.
(Business Address)

NOTE: If the Bidder is a corporation, indicate State of Incorporation under signatures; and, if a partnership, give full names of all partners.

12 October 1951

REGISTERED MAIL - RETURN RECEIPT REQUESTED**600.1 Camp Ritchie - NAWVL****(Primary Site)****NOTICE OF AWARD AND NOTICE TO PROCEED**

John McShain, Inc.
17th & Spring Garden Streets
Philadelphia, Pennsylvania

Gentlemen:

You are hereby notified that your proposal dated 2 October 1951 in the total amount of \$6,574,825.00 for Proposals Nos. 1 and 2 and is accepted for construction and completion of the Camp Ritchie Project - Primary Site, Camp Ritchie, Maryland.

Contract No. DA-49-080-eng-856 is being prepared for signature. Acceptable Payment and Performance Bonds must be furnished upon execution of the formal contract.

This is your formal notice to proceed with the work under the contract. The representative of this office responsible for superintending the work covered by the above contract is:

Colonel Robert P. Kline
Area Engineer
Camp Ritchie, Maryland

Telephone Highfield, Maryland - 231

It is requested that you acknowledge receipt of this notice of award and notice to proceed on the three inclosed copies, retaining one copy and returning the original and one copy to this office at once.

Sincerely yours,

ALAN J. McCUTCHEN

Colonel, Corps of Engineers

NOTICE OF AWARD AND

NOTICE TO PROCEED RECEIVED:

District Engineer

JOHN McSHAIN, INC.

By _____

Date _____

[Filed June 21, 1955]

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AMENDED ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Defendant admits the allegations of Paragraphs 1, 2, 3, 4, and 5 of the complaint.

Third Defense

Defendant denies the allegations of Paragraph 6 of the complaint which require an answer.

Fourth Defense

Further answering the complaint, the defendant states as follows:

- (a) Before the plaintiff issued to the defendant a request for a proposal, plaintiff represented to all prospective proposers that the conditions and price which would be set forth in any proposal would not be final but that after the proposals were opened, negotiations would be conducted for the purpose of determining what the final conditions and price would be. In its formal request for proposals (Exhibit A of the complaint) plaintiff represented that the defendant's proposal would be received for the purpose of negotiating a contract. This procedure was identical with a previous transaction in which defendant had submitted a proposal and later negotiations had resulted in a contract different in conditions and price from those in the proposal. Accordingly, defendant's proposal was not an offer which was final as to conditions and price, but was means of initiating negotiations with the plaintiff for a contract.
- (b) At the time the defendant submitted its proposal, defendant was already engaged on a Camp Ritchie project covered by the earlier contract referred to above. This project was located near the project which is the subject of this suit, and defendant had its office organization and equipment and

20

facilities set up there, which would make it less expensive to carry on this second project. In submitting its proposal, defendant took these facts into account and relied upon the continuation of its then existing contract. Unknown to the defendant, the plaintiff was contemplating terminating the major portion of that project, and did so after issuing the Notice of Award and Notice to Proceed.

Plaintiff nevertheless issued its "notice of award and notice to proceed" as alleged in Paragraph 4 of the complaint, when it knew or should have known all the facts stated in this sub-paragraph and did not inform the defendant of its intentions.

- (c) Six proposals were submitted to the plaintiff and opened on October 2, 1951. Bid bonds were not required and not furnished. The three lowest proposals were \$8,033,110; \$7,944,011; and \$6,574,825. The last named and lowest proposal was that of the defendant. It was \$2,170,157.50 less than the average of the six proposals submitted and \$1,369,185 less than the next lowest proposal.

21

- (d) Plaintiff did not conduct the required negotiations. On October 12, 1951, after a brief conference with employees of the defendant who were without authority to negotiate for or to bind the defendant, plaintiff issued to the defendant its "notice of award and notice to proceed" together with contract and bond forms for execution by the defendant, neither of which the defendant executed or accepted. Defendant alleges that plaintiff did not attempt to or intend to negotiate with the defendant at that conference. Subsequently, the defendant specifically informed the plaintiff of many matters which would have to be negotiated before any contract could be signed or any agreement reached. Among these were the fact that the plaintiff on November 5, 1951, had terminated the major portion of the Camp Ritchie job on which the defendant relied; a

jurisdictional dispute within the union, and the refusal of the workers to work at the rate published by the Secretary of Labor; serious mistakes and errors in the defendant's proposal, and other matters which would vitally affect the fixing of final conditions and price. On the basis of these representations seasonably made to the plaintiff, the defendant urged the plaintiff to negotiate with the defendant, but the plaintiff refused to do so.

Fifth Defense

Defendant pleads in the alternative that if a contract was made between the plaintiff and the defendant, the contract should be rescinded because of excusable mistakes and errors in the defendant's proposal known to the plaintiff by examination of the proposal itself and by notice seasonably given to plaintiff by defendant.

Because of the volume and complexity of the specifications; (nearly 600 pages in length besides numerous drawings and four added specifications;) and the short time permitted for preparing the proposal (less than two weeks) defendant overlooked some items of cost (two items of which totalled over \$225,000) and underestimated other items (such as one estimated at \$5,000 which turned out to cost more than \$45,000). Furthermore no allowances were made in the defendant's proposal for contingencies such as increase in costs of material and in wages. These matters were known by the plaintiff or were called to the attention of the plaintiff on October 2, 1951, October 12, 1951, October 24, 1951, October 26, 1951, November 14, 1951, December 31, 1951, and on other dates during that period which are presently unknown to defendant.

Sixth Defense

Defendant presented the facts in this case to the Secretary of the Army. The Secretary of the Army on January 11, 1952 wrote a letter to the Comptroller General of the United States with enclosures requesting a decision. On February 12, 1952 the Comptroller General decided on the basis of the facts developed from the evidence presented that no contract was ever consummated and that the defendant had incurred no liability

under its bid. A copy of said letter of the Comptroller General is attached hereto and made a part hereof as Exhibit A.

Seventh Defense

There was no contract between the plaintiff and the defendant for the reason that no agreement was reached between them.

/s/ CHARLES B. MURRAY
Attorney for Defendant

A jury trial is demanded on all issues in this case.

/s/ CHARLES B. MURRAY
Attorney for Defendant

23 [Filed June 21, 1955] (Exhibit "A")

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

Feb 12, 1952

C
O
P
Y

The Honorable

The Secretary of the Army

My dear Mr. Secretary:

Reference is made to your letter of January 11, 1952, with enclosures, requesting a decision as to whether an enforceable contract exists between the Government and John McShain, Inc., for certain construction work at Camp Ritchie, Maryland, covered by Invitation No. ENG-49-080-52-13-(15), dated September 14, 1951.

The record shows that, at a conference held in the office of the District Engineer, Washington, D. C., on September 6, 1951, for the purpose of acquainting prospective bidders with the general nature of the work to be performed, the contractors present, including representatives of John McShain, Inc., were advised in part as follows:

"The proposals will be opened in this room at 1500 hours on the 2nd of October, 1951. Negotiations will be conducted with those submitting the three lowest proposals to determine the final conditions and price."

The referred-to invitation was issued under date of September 14, 1951, and stated that proposals, which would be the basis of negotiating

a construction contract, would be received until October 2, 1951. Of the proposals received, that of John McShain, Inc., was low at \$6,574,825, the other proposals ranging from \$7,944,010 to \$11,509,980. The proposal did not contain any qualification and stated that the contractor would execute a contract within 30 days after date of opening and would commence work within 10 days after receipt of notice to proceed. It is stated in first indorsement of December 3, 1951, from the Division Engineer to the Chief of Engineers, that the Division Engineer, immediately after the results of the bidding were reported to him, instructed the District Engineer to determine whether an error had been made by John McShain, Inc., in view of the relatively low bid submitted, but that, when the District Engineer replied that the contractor was pressing for an award of the contract, authority to make such award was granted.

In your letter of January 25, 1952, with reference to the matter, you state that, after the proposals were opened, the second and third lowest bidders indicated that, in view of the low proposal submitted by McShain, they were not interested in further negotiations as they could not approach the price; that the Corps of Engineers was cognizant that McShain was "able to pare certain administrative expenses because of the fact that a previous contract [No. DA-49-080-eng-833] was still in force"; and that on October 12, 1951, representatives of the contractor attended a conference--which is shown to have been held in the office of the District Engineer, Washington, D. C. --" for the purpose of discussing the proposal and settling any contract questions. "

The record shows that three representatives of John McShain, Inc., none of whom were officers of the corporation, attended the conference of October 12, and that these representatives asked various questions relating to the performance of the work and gave no indications that John McShain, Inc., would not be willing to take the contract at the amount stated in its proposal. Mr. Paul Hauck, the contractor's general manager, who was present, did express some concern because the amount quoted did not include anything to cover contingencies, overtime, liquidated damages, or price and wage increases. On the same day, but subsequent to the

conference, a formal notice was issued by the District Engineer to the contractor stating that its proposal, in the amount of \$6,574,825, was thereby accepted, that a formal contract was being prepared, and that the contractor was to proceed with the work. The contractor was requested in the notice to acknowledge receipt thereof in the space provided for the contractor's signature and to return the original and one copy to
25 the office of the District Engineer at once, retaining a copy.

The record contains a memorandum made by the District Engineer of a conference held in his office with John McShain and Paul Hauck on October 24, 1951, which states that Mr. McShain stated at such time that he was willing to go ahead with the job, but that two of the trades, plumbers and steamfitters, had refused to man the job at the wage rates set forth by the Department of Labor, and the Baltimore unions were requesting that the Ritchie project be placed within their district and were requesting an increase in wage rates, and that he thought it was the responsibility of the District Engineer to have the Department of Labor issue new wage rates in line with the Baltimore rates, or place the Ritchie project under jurisdiction of Hagerstown unions, which would mean lower rates. The memorandum states that Colonel McCutchen stated that the contractor would have to have the International Union state its refusal, in writing, to man the job at the rates published by the Department of Labor, in which case the matter would be submitted to the Chief of Engineers and be forwarded to the Department of Labor. In an affidavit filed with this Office by John McShain on January 28, 1952, it is stated that the affiant informed the District Engineer at this meeting that a serious mistake had been made in the computation of the bid, but that, by reason of the fact that the contractor had contract No. DA-49-080-eng-833 to perform, the contractor could probably "get by" with the contract involved. However, affiant further states that he advised the District Engineer that certain items would have to be adjusted and cleared up before any contract could be signed, or agreement reached, particularly the wage scale situation.

By letter of October 26, 1951, John McShain, as President of John

McShain, Inc., advised the District Engineer that the contractor had purposely delayed returning the notice to proceed in view of the serious problem of the wage scale which, it was believed, should be settled before any attempt was made to proceed with the work. Also, on November 7, 26 1951, the contractor, having received notice on November 5, of the termination for the convenience of the Government of what appears to have been the major portion of contract No. DA-49-080-eng-833, wrote the District Engineer that the cancellation of said contract had seriously affected its position on the contract here involved and requested a conference on November 14. At the conference, according to the memorandum in the record, John McShain stated that he had "bid" for the work here involved solely because of having been awarded contract No. DA-49-080-eng-833; that he had been prepared to absorb the loss due to his mistake by reason of having the first contract, and that he did not feel that he could possibly undertake the work under the circumstances. Accordingly, he asked to be excused, stating that the contracting Officer should have recognized that the bid was extremely low in comparison with the others and notified him of a possible mistake at the time.

The contractor contends before this Office that the mistakes in the calculation of its bid which were set forth in its letter of December 31, 1951, to you, were made because of the necessary haste in preparing its bid. In this connection, the contractor calls attention to the fact that the specifications for the work involved approximately 575 pages and, in addition, four addenda, of which two are dated September 20, 1951, and the others September 25 and September 26, 1951, and that extensive drawings formed a part of the requirements for a bid. In the affidavit referred to above, John McShain states that, on October 2, 1951, in reviewing the estimates which the contractor had received for the subcontracts and the information covering the work to be done by the contractor, some doubt arose in his mind as to the advisability of attempting to submit a bid covering the work. However, he states that, in view of the statement which had been made to prospective bidders at the conference 27 of September 6, 1951, to the effect that negotiation would be conducted

with those submitting the three lowest proposals to determine the final conditions and price, he decided to submit a figure based upon the estimates that were available in the belief that any discrepancies arising could be taken care of before the contract was finally negotiated. The contractor contends that the notice of award was issued before any negotiations were held with representatives of the contractor who would be authorized to consummate a contract, and that, since the award of the contract never was finally accepted, no contract can be said to have been consummated.

The contractor's bid was considerably lower than the other bids and you have stated, as indicated above, that the Corps of Engineers was aware that the contractor would be able to pare certain administrative expenses by reason of having another contract to perform at the site of the work. Also, the contracting officer was advised from the statement made by Mr. Hauck at the meeting of October 12, referred to above, that the contractor's bid included nothing for contingencies. Under these circumstances, the Department of the Army would have been under a duty to advise the contractor that the termination of contract No. DA-39-080-eng-833 was being considered before accepting its bid in the event it had any information to that effect. While you state in your letter of January 25, 1952, that the contracting officer had no knowledge that said contract would be terminated, it is not shown that other officials of the Department of the Army were unaware of such fact.

However, aside from the above question, there is the more fundamental one of whether a contract was ever consummated. The fact that prospective bidders were advised at the pre-bid conference that negotiations would be conducted with those submitting the three lowest proposals to determine the final conditions and price and that the invitation stated that the proposals would be received for the purpose of "negotiating" a construction contract would be calculated to lead bidders to believe that the contract was to be negotiated informally, rather than on a formal bid and acceptance basis. It is not denied in your letter of January 25

28 that negotiation with the bidders following receipt of the proposals was

contemplated at the time the invitation was issued, but you state that the meeting of October 21 was considered to cover all the points subject to negotiation, since the price quoted apparently was acceptable to the contractor at that time.

Admittedly, the representatives of the contractor who were present at the meeting of October 12 should have stated at that time that the amount bid was not considered by the contractor to be firm. However, if as appears to be the case it is admitted that the contractor was entitled to negotiate the contract informally and that the proposal submitted was not, therefore, understood to be a firm proposal, then it necessarily follows that any negotiation had would not be binding on the contractor unless transacted with representatives of the contractor who were duly authorized to enter into a final and binding agreement. In this connection, there has been submitted here a "Certificate of Certification of Secretary of John McShain, Inc., of Delaware," wherein it is stated that the President and, in his absence or disability, the Vice-President, are authorized by sections 31 and 33 of the by-laws of the corporation to execute bonds and other contracts requiring the seal, under the seal of the corporation, and that the only other persons authorized to perform such functions for the corporation are Vincent P. McDevitt, the corporation's counsel, and Edward S. Barnhart, Secretary of the corporation, who, jointly and severally, were appointed attorneys-in-fact for the corporation at a special meeting of the Board of Directors held on July 5, 1949, and that their authority to perform such functions is operative only when the President and Vice-President of the corporation are absent from the country. Relative to the authority of Messrs. Hauck, Tippet and Russell, the representatives of the contractor who were present at the meeting of October 12, 1951, it is stated in the McShain affidavit as follows:

29

"All bids submitted by the Corporation must be approved by me before submission and Messrs. Hauck, Tippet and Russell have never been authorized to submit, nor have they ever submitted, a bid on behalf of the Corporation without securing such approval.

"Messrs. Hauck, Tippet and Russell have never been authorized to negotiate or accept, nor have they ever negotiated or accepted, a contract on behalf of the Corporation. On occasion they have communicated to contracting officers the fact that I have approved particular contracts, having obtained my approval before the meeting or during the course of the meeting by telephone."

Of course, the representatives referred to, who were not officers of the corporation, would have no implied authority to bind the corporation in a matter of this kind for the reason that negotiation of the contract necessarily included the execution of the contract and the payment and performance bonds, which were required to be signed by an officer of the corporation. Hence, it would seem that the proceedings which took place at the meeting of October 12 did not amount to a negotiation of a final contract, or have the effect of converting the contractor's proposal to a firm bid the purported acceptance of which created a contract. On the contrary, there is substantial basis for the view that the notice of award and notice to proceed which was issued to the contractor on October 12, 1951, constituted no more than a firm offer on the part of the Government to award the contract to the contractor at the price stated in its proposal and, as such, would have had to have been accepted without qualification by the contractor in order for a contract to be consummated. As indicated above, the contractor never returned the referred-to notice with its signature, as contemplated, and there is considerable doubt that a court would hold that the statement reported by the District Engineer to have been made by John McShain at the meeting of October 24, 1951, to the effect that he was willing to go ahead with the work, constituted an acceptance of the offer of award, particularly in view of the fact that McShain reportedly followed such statement immediately with the statement that he thought it was the responsibility of the District Engineer to take action to the end that certain wage-rate problems could be resolved, and of the

30 contention made in McShain's affidavit, referred to above, as to the conditional nature of the offer. Moreover, the contractor's letter of October

26, 1951, the contents of which are set out above, is capable of being interpreted as a conditional acceptance only. The negotiations were in this status when, on November 14, 1951, the contractor advised the District Engineer that it would be unable to undertake the work in view of the termination of contract No. DA-49-080-eng-833. Hence, under the facts developed from the evidence presented here, and considering the ambiguities, uncertainties, and confusion which attended the entire transaction, there appears no clearly sound basis for concluding that a contract was ever consummated, or that John McShain, Inc., has incurred any liability under its bid.

The copy of contract No. DA-49-080-eng-856, the specifications thereto and abstract of bids, as well as copy of contract no. DA-49-080-eng-833, are returned herewith. The other papers transmitted with your letter are being retained in this Office.

Sincerely yours,

/s/ Lindsey C. Warren

Comptroller General
of the United States

Enclosures.

COPY

31

[Filed Dec. 2, 1955]

**PLAINTIFF'S MOTION FOR JUDGMENT ON
THE PLEADINGS AND FOR AN ORDER FOR
TRIAL ON THE AMOUNT OF DAMAGES.**

Upon the pleadings herein, plaintiff moves the Court

(a) for judgment on liability pursuant to Rule 12 of the Federal Rules of Civil Procedure upon the grounds

(i) that the admissions of fact contained in the amended answer entitle plaintiff to such judgment as a matter of law and

(ii) that the affirmative matters alleged in the answer

do not constitute a legal defense thereto; and
 (b) for further order for trial pursuant to Rule 42(b) of the Federal Rules of Civil Procedure as to the damages sustained by plaintiff.

Respectfully submitted,

/s/ WARREN E. BURGER

Assistant Attorney General

/s/ LEO A ROVER

United States Attorney

/s/ GEO. STEPHEN LEONARD

First Assistant to the Assistant
 Attorney General

/s/ F. CAROLYN GRAGLIA

Attorney

Department of Justice

33 [Memorandum in Support of Plaintiff's Motion for Judgment on the Pleadings And for An Order For Trial On the Amount of Damages, Filed December 2, 1955.]

56 [Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion For Judgment On The Pleadings, Filed Jan. 21, 1956.]

81 [Filed March 29, 1956]

ORDER

This cause having come on for hearing on February 10, 1956, on the motion of the plaintiff for judgment on the pleadings and other relief, and the Court after consideration of the briefs and arguments of counsel having rendered its decision by memorandum dated March 19, 1956, it is this 29th day of March, 1956,

ORDERED:

1. That the first, fourth, sixth, and seventh defenses contained in the amended answer be stricken as legally insufficient.

2. That the fifth defense will be considered as an affirmative plea for rescission of the contract and as so considered will be sustained, and a separate trial is hereby ordered pursuant to rule 42(b) of the Federal Rules of Civil Procedure on the issues raised thereby.

3. That, dependent upon the outcome of the separate trial on the fifth defense, the further issue raised by the third defense will thereafter be set down for trial.

4. That in all other respects plaintiff's motion is denied.

/s/ JOSEPH C. McGARRAGHY

United States District Judge

(CERTIFICATE OF SERVICE)

83 [Filed May 24, 1956]

NOTICE OF APPEAL

Notice is hereby given this 24th day of May, 1956, that John McShain, Inc., the defendant above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 29th day of March, 1956 in favor of UNITED STATES OF AMERICA, plaintiff above-named, against said defendant, John McShain, Inc.

/s/ Charles B. Murray

Attorney for Defendant
1001 Conn. Ave., N.W.
Washington 6, D. C.
